

**STATE OF MICHIGAN
IN THE SUPREME COURT**

**Appeal from the Court of Appeals
Donald S. Owens, Presiding Judge**

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant,

-vs-

FREDERICK GOTTSCHALK and
JEFFREY SILAGY

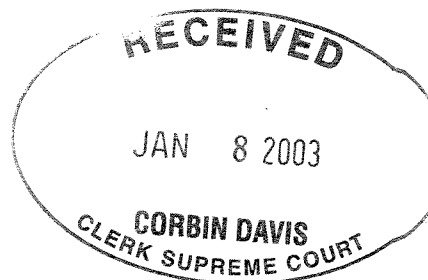
Defendants-Appellees,

Supreme Court Nos.:
121833 & 121834

REPLY BRIEF ON APPEAL – APPELLANT

ORAL ARGUMENT REQUESTED

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QUESTION PRESENTED FOR REVIEW

IS THE SPECIAL PROSECUTOR, APPOINTED BY REASON OF A CONFLICT OF INTEREST ON THE PART OF THE COUNTY PROSECUTOR, UPON THE REQUEST OF THE COUNTY PROSECUTOR, AUTHORIZED TO INVESTIGATE AND BRING CHARGES AGAINST A DEFENDANT UNDER MCL 49.160?

STATEMENT OF APPEAL

Plaintiff-Appellant, State of Michigan, by and through the Special Prosecutor appeals the decision of the Court of Appeals in the consolidated cases of People of the State of Michigan v Fred Gottschalk, No. 237681, and People of the State of Michigan v Jeffrey Silagy, No 237682, dated June 18, 2002. Plaintiff-Appellant asks this Honorable Court to reverse the decision of the Court of Appeals, affirm the decision of the Circuit Court and remand this case to the Circuit Court for trial on the charges filed.

REPLY TO COUNTER STATEMENT OF FACTS AND PROCEEDINGS

While generally, correct, the Counter Statement of Facts as stated by the Defendants-Appellees, and adopted by the *Amici Curiae*, makes some errors which need to be corrected.

Barry Schantz, the Special Prosecutor, appointed under a substantially identical order to that which was used to appoint Maureen Holahan in this case, was appointed by Judge J. Richard Ernst, the sitting Circuit Court Judge who also appointed Maureen Holahan. No charges were then pending against Steven Freund in any court arising from the alleged filling of a wetland.

At the preliminary examination held in this case on April 20, 2001, Mr. Schantz testified as follows:

Q. How did you become involved in the case of Steven Freund?

A. I was contacted by the Prosecuting of (sic) Attorney of Iosco County, who at that time was Gary Rapp, and who still is. He advised me of a conflict that he believed he had in a pending investigation, asked me if I would be willing to serve as a Special Prosecutor. He advised me that it involved a wetlands violation, advised me that the investigating officer was Mr. Silagy, who I had never met before, and subsequent to that I received copies of a Petition for the Appointment of a Special Prosecutor, and an Order Appointing myself. I believe they were filed some time in February of 1997, the Order was issued by Judge Richard Ernst of the 23rd Circuit Court, and as I recall, the basis for the special appointment was that the suspect in this matter, I believe Mr. Steven Freund, was a person who had done some contracting work for Mr. Rapp, and to whom Mr. Rapp still owed money.

Lines 18-25, page 24 through lines 1-5, page 25, Transcript of preliminary examination, April 20, 2001.

It is clear, from this recitation, that no charges were then pending. The Attorney General had not approved the bringing of charges. In fact, the necessity of appointing the special prosecutor arose because of the failure of the Attorney General's office to do anything (other than lose the file) when it was forwarded by Gary Rapp. See pages 115a-119a, Appellant's Appendix. If the present position of the Attorney General were, indeed, the state of the law, no

charges could have been filed by Mr. Schantz in the first place, and this case would not have arisen. The county prosecutor, Mr. Rapp, had not commenced an action and the Attorney General did not authorize one. The Order appointing Mr. Schantz would have been defective in that it recited MCLA 776.18 as the statute authorizing the appointment.

However, no such objections were made, and the events transpired to bring us here.

When Mr. Schantz was asked at the preliminary examination about the bringing of charges, he said:

Q. And did Mr Silagy advise you of who he wished to bring charges against?

A. Well, he presented me with a case summary of some other documents, and I can't tell you which documents came initially, and which came later, because the whole file didn't come at once. About a month later I received a significant number of additional documents. Apparently, this case had been -- there'd been an exchange of correspondence going back to 1994, and I wasn't aware of a lot of that, I just had a basic summary, and in discussing the case with Mr. Silagy, he pointed out an initial application for a wetland fill permit from a Mr. William Freund, who I understand is Mr. Steven Freund's father. He point out a subsequent application that was filed, I believe, in '95, where the application was made by Steven Freund as the agent or contractor, person in charge of the project. We discussed further, in reviewing the case summary that Mr. Silagy had had most of his contact and communication, at least in the last year or so, with Mr. Steven Freund. There was a letter in the file to that effect. Further, I notice in the case summary a reference to the actual incident where an employee of Katterman Trucking, I believe, was onsite to deliver fill to the site, and in the case summary it said that the employee, I believe a Mr. Greg McCulsky [Michalski]. or something like that, inquired of Mr. Freund, according to the case summary, if he had a wetlands permit, and that Mr. Freund advised him that he did, and so the fill was poured then, and he advised me that to his understanding he had had a telephone conversation with either the owner or an employee of Katterman Trucking, and that the individual that was onsite when the fill was delivered was Steven Freund, according to his information. You want me to stop here and wait for another question?

Lines 18-25, page 25 through lines 1-18, page 26, transcript of preliminary examination, April 20, 2001.

And in further questioning about the bringing of charges, Mr. Schantz said:

- Q. Now, before you made your determination to issue any charges against Mr. Freund, what information did you have in front of you?
- A. All I recall is I relied primarily on the case summary that was brought to me by Mr. Silagy, and on an interview of Mr. Silagy and some other documents of case background. I guess I also had the information that according to the Order appointed me, that Steven Freund was the suspect in the case as it had been determined at that point in the Iosco County investigation. That's according to the Order appointing me.

Lines 19-24, page 40, transcript preliminary examination, April 20, 2001

It was on the basis of the information supplied by Mr. Silagy that Mr. Schantz charged Steven Freund with depositing or permitting the placement of fill on the subject property. After Mr. Silagy contacted Greg Michalski in anticipation of the district court trial against Steven Freund and advised Mr. Schantz “. . . that in fact it was William Freund that had represented he had a permit when the fill was delivered” (Lines 13-14, page 35, transcript of preliminary examination, April 20, 2001), the district court case was dismissed. According to Mr. Silagy's Freund file summary of March 16, 1998: “On approximately 1/14/98 the Oscoda County Prosecutor made a motion for nolle prosequi, in the Best Interests of Justice, and the case was dismissed without prejudice on 1/20/98.” (Appellant's Appendix, page 130a)

The civil action is not relevant to this case, and while the Attorney General's office did defend the civil case(s), the Special Prosecutor in this action was not in any way involved in that action.

The Defendants-Appellees and the Attorney General contend that District Judge Yenior “rejected a petition by the Michigan Attorney General to intervene in the prosecution.” That statement is patently false. Judge Yenior's Opinion and Order states as follows:

“Notwithstanding the above, MCL 14.28 does state that the Attorney General, in his (her) judgment, may intervene in a criminal case in any court in this state. Note that the statute does not give the right to take over, just to intervene. To intervene is to become involved in as a third party or on one of the sides. If the Attorney General wishes to intervene by getting involved with and assisting one

side or the other, he (she) appears to have that right. He (she) does not have the right to take over.”

Appellant’s Appendix, page 139a.

According to Mr. Robert Ianni, the move to try to take over the case is highly unusual. When the Assistant Attorney General called to seek Ms. Holahan’s concurrence in his request to assume prosecution jurisdiction, he advised that on only one other occasion in his legal career with the Attorney General’s office has this occurred. It involved a case in Oakland County. A number of auto dealers colluded with a mechanic to engage in utility fraud. The mechanic would file down the wheels in the meters so that they would not accurately reflect the usage of the utility. Then County Prosecutor Brooks Patterson was going to charge the mechanic and leave the dealers alone. The Attorney General stepped in to bring a conspiracy case against all who were involved so that not just the mechanic would take the fall. (Appellant’s Appendix, Pages 31a-32a)

The recitation of the procedural history of the case is otherwise accurate.

ARGUMENT

THE SPECIAL PROSECUTOR, APPOINTED BY REASON OF A CONFLICT OF INTEREST ON THE PART OF THE COUNTY PROSECUTOR, UPON THE REQUEST OF THE COUNTY PROSECUTOR, IS AUTHORIZED TO INVESTIGATE AND BRING CHARGES AGAINST A DEFENDANT UNDER MCL 49.160.

The Defendants continue to argue that the Order Appointing Special Prosecutor is controlled by MCL 776.18.

The Order itself is internally inconsistent. It cites a statute for appointing Assistant Prosecutors and entitles the person appointed "Special Prosecutor". The only statute which deals with Special Prosecutors is MCL 49.160. It is the statute which applies when a conflict of interest presents itself to a county prosecutor. It specifically authorizes a circuit court judge to "appoint an attorney at law as a special prosecuting attorney to perform the duties of the prosecuting attorney in the respective court in any matter in which the prosecuting attorney is disqualified or until such time as the prosecuting attorney is able to serve." MCL 49.160(1)

The Defendants then argue that District Court Judge Yenior was wrong to treat the Order appointing Special Prosecutor as one controlled by MCL 49.160. Since the Order was internally inconsistent, the District Judge had to take all of the circumstances into consideration and decide how to interpret it. He correctly treated the appointment as one authorized under MCL 49.160.

As a matter of interest, one notes that the Order from the Court of Appeals granting Defendants application for leave to appeal to the court of appeals is dated, on its face "Jan 3 2001." (Appellees' Appendix, page 124b) In fact, the date of entry was January 3, 2002. However, if the order is interpreted on face value, all briefs filed by the Defendants in this case were untimely filed, and the appeal should have been dismissed, since "In Michigan, judges speak through their orders." *Johnson v White*, 430 Mich 47, 53 (1988)

However, the courts are not foolish. The Michigan Court Rules of 1985 have taken into consideration that people make mistakes. MCR 6.435 provides specifically for correction of mistakes. MCR 6.435(A) provides for the correction of clerical mistakes such as the date on the Court of Appeals Order allowing Defendants leave to appeal.

MCR 6.435(B) provides for the correction of substantive mistakes. It states:

(B) **Substantive Mistakes.** After giving the parties an opportunity to be heard, and provided it has not yet entered judgment in the case, the court may reconsider and modify, correct, or rescind any order it concludes was erroneous.

In this case, no judgment has been entered. If it is necessary to correct the Order Appointing Special Prosecutor, the trial court will be able to do so when the case is remanded for trial. *People v Jones*, 203 Mich App 74, 80 (1993)

For all of these reasons, it is clear that this case should be considered under the statute which provides for the appointment of a special prosecutor, MCL 49.160. After the sections providing that the circuit judge may appoint the special prosecutor, the statute discusses the powers of that appointee:

Powers; duration. (3) A special prosecuting attorney appointed under this section is vested with all of the powers of the prosecuting attorney for the purposes of the appointment and during the period of appointment.

This language is clear. It does not need “interpreting.” It gives the special prosecutor all of the powers of the county prosecutor including the power to investigate and bring charges. In *Pohutski v City of Allen Park*, 465 Mich 675, 683-684 (2002), the Michigan Supreme Court spoke to the issue of statutory interpretation:

When faced with questions of statutory interpretation, our obligation is to discern and give effect to the Legislature’s intent as expressed in the words of the statute. . . . We give the words of a statute their plain and ordinary meaning, looking outside the statute to ascertain the Legislature’s intent only if the statutory language is ambiguous. . . . Where the language is unambiguous, “we presume that the Legislature intended the meaning clearly expressed – no further judicial

construction is required or permitted, and the statute must be enforced as written.” . . . Similarly, courts may not speculate about an unstated purpose where the unambiguous text plainly reflects the intent of the Legislature. . . .

When parsing a statute, we presume every word is used for a purpose. As far as possible, we give effect to every clause and sentence. “The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another.” . . . Similarly, we should take care to avoid a construction that renders any part of the statute surplusage or nugatory.

To adopt the argument of the Attorney General and the Defendants in this case is to ignore, render nugatory, and torture the language of the statute, and particularly Section (3) which specifically gives the special prosecutor all of the powers of a county prosecutor.

In the Appellant’s Brief on Appeal, the cases of *Sayles v Circuit Judge*, 82 Mich 84 (1890), *People v Davis*, 86 Mich App 514 (1978), *lv den*, 406 Mich 894 (1978), *Genesee Prosecutor v Circuit Judge*, 386 Mich 672 (1972), *In re Petition for Appointment of Special Prosecutor*, 122 Mich App 632 (1983) and *People v Herrick*, 216 Mich App 594 (1996) were discussed in detail. The reliance of the Court of Appeals on the latter two cases was misplaced. While both of those cases were correctly decided on their facts, the discussion in the cases on the limitations of special prosecutors is sheer *dicta*, and incorrect reasoning. To adopt that reasoning is to ignore the teachings of *Pohutski* as set forth above.

People v Antero Williams, 244 Mich App 249 (2001) was also correctly decided on its facts. The prosecutor appealed the dismissal of assault charges by the circuit judge on the day of trial because the complaining witness did not appear. She was the girlfriend of the defendant. She had been served a subpoena to appear. The prosecutor requested the court grant a continuance and issue a bench warrant for the victim, or in the alternative to allow the use of the victim’s testimony from the preliminary examination and a prior hearing. The Defendant objected and requested a dismissal. After concluding that the victim did not want defendant

prosecuted and that the present offense was a private crime rather than a public crime, the trial court dismissed the charges. While this case does not involve a special prosecutor, it shows that trial courts sometimes err when dealing with county prosecutors. It was clearly an error for the judge to try to overrule the prosecutor's decision to charge and proceed to trial.

This case does nothing to forward the Defendants or the Attorney General's argument. In our case, after the special prosecutor was appointed, she determined the charges and that they should be brought. The circuit court judge was not involved in any of these decisions.

Once Gary Rapp had determined not to bring perjury charges, but determined that charges might well be brought in connection with Steven Freund's complaint, he disqualified himself and requested the circuit judge to appoint a special prosecutor. The Order Authorizing Appointment of Special Prosecutor (Appellee's Appendix, page 148a) does not specify what charges were to be brought. It does not specify against whom charges should be brought. It does not specify if charges should be brought. If any of these provisions were in the order, it would be unconstitutional under the teachings of *People v Anterio R. Williams, supra*, because the circuit judge would have usurped the role of the prosecutor. Instead, the order only appointed a lawyer, as provided in MCL 49.160, to act as a special prosecutor. Again, it stated:

IT IS HEREBY ORDERED AND ADJUDGED that MAUREEN HOLAHAN (P24301) is appointed pursuant to MCLA 776.18, as Special Prosecuting Attorney for the County of Iosco, State of Michigan, to serve in the capacity of reviewing the incident report referred to in the attached Petition, making a determination whether a warrant should be issued and to serve during the pendency of that case only.

While the citation to MCLA 776.18 is in error, since it applies to the appointment of an assistant prosecuting attorney when a conflict does not prohibit it, MCL 49.160 relates the two statutes to each other in Section (4):

Inapplicability of section. (4) This section shall not apply if an assistant prosecuting attorney has been or can be appointed by the prosecuting attorney pursuant to section 18 of chapter 16 of Act No. 175 of the Public Acts of 1927, being section 776.18 of the Michigan Compiled Laws, to perform the necessary duties with the constraints of that section or if an assistant prosecuting attorney has been otherwise been appointed by the prosecuting attorney pursuant to law and is not disqualified from acting in place of the prosecuting attorney.

MCL 49.160 is clear and unambiguous. If an assistant prosecutor can be appointed under MCL 776.18, it should be done. [Section (4)] If, by reason of the circumstances of the case, MCL 776.18 cannot be used, a court may appoint a special prosecutor. [Section (1)]. If a circuit court determines that the county prosecutor cannot act, the court may appoint an attorney to act as a special prosecutor until the county prosecutor is able to serve. [Section (4)]. The special prosecutor has all of the powers of the prosecutor for the purposes of the appointment and during the period of the appointment. [Section (3)].

The Attorney General makes an erroneous statement when he claims that MCL 776.18 allows only the prosecuting attorney to appoint an assistant prosecutor and does not allow a member of the judiciary to appoint a special prosecuting attorney.

Again, MCL 776.18 states as follows:

Sec. 18. The prosecuting attorney may, **under the direction of the court**, procure such assistance in the trial of any person charged with a felony as he may deem necessary for the trial thereof, and the prosecuting attorney may, **under the direction of the court**, in case of disability of the prosecuting attorney, appoint an assistant to perform his duties during the disability of the prosecuting attorney, and such assistant shall be allowed such reasonable compensation as the board of supervisors or the board of county auditors in counties having county auditors shall determine, for his services to be paid by the county treasurer upon presenting to said board the certificate of the circuit judge of the county for which such services were performed, certifying to the services rendered by such assistant: Provided that no person or attorney employed or appointed as assistant who is interested as attorney or other wise in any case involving the same facts or circumstances involved in the cases to be conducted or tried by said assistant, or who has received any compensation from any person or persons who are interested in such cases. (Emphasis added.)

It is clear from the language of the statute that a prosecutor cannot appoint an assistant prosecuting attorney. He can only do it under the direction of the court. The circuit judge must then certify that the services were performed.

The Attorney General argues that the change in the statute, MCL 49.160, after *People v Davis, supra*, were cosmetic. That statement is not accurate. With the changes, the legislature clarified who could appoint a special prosecutor, when a special prosecutor could be appointed and when he cannot be appointed. It specifically stated what the powers of the special prosecutor would be. If the changes were only cosmetic, the statute would not have been changed.

The Defendants argue that even if the statute allowed for the appointment of a special prosecutor and the investigation and bringing of charges by the special prosecutor, the statute, MCL 49.160, is unconstitutional. It does not appear that the Attorney General takes this position in the *Amici* brief. To the contrary, the Attorney General says that an unambiguous statute has been interpreted to limit the power of a special prosecutor's powers to investigate complaints of a crime and initiate criminal charges.

The Attorney General first argues that the appointment of a special prosecutor under a statute that clearly gives such a prosecutor "all of the powers of the prosecuting attorney" somehow does not include the power to investigate and constitutes judicial interference with the executive function. In the very next paragraph, the Attorney General argues that appointment of a circuit judge by another circuit judge under the one-man grand jury statute to conduct an investigation is somehow not "judicial interference" in the executive function.

As has been previously pointed out, the statute is clear. The language in the cases relied upon by the Attorney General is *dicta*, and allows exactly the actions taken in this case. The

only way to get around the propriety of the appointment of Ms. Holahan is to argue that the statute is unconstitutional, as the Defendants do.

The problem with that argument is that it is incorrect.

Defendants first argue that the Michigan Legislature violated the federal separation of powers doctrine when enacting MCL 49.160

Defendants rely on *Nixon v Adm'r of General Services*, 433 US 425 (1977) in support of the proposition that federal separation of powers may be violated by one branch of government interfering with another's performance of its constitutionally assigned function. This case arose from an agreement which Richard Nixon struck with the Administrator of General Services, Arthur Sampson, four months after he left office. This agreement dealt with the storage, preservation and destruction of tapes and records accumulated during his presidential term. Thereafter, the Congress passed and President Gerald Ford signed a law abrogating the Nixon-Sampson agreement, and asserting control over the documents and tapes. Nixon then sued.

While there were several grounds raised by Nixon, we will concentrate on the separation of powers issue. The United States Supreme Court found that the act did not constitute an illegal assumption of power by the legislature.

While Defendants cite page 433 of the case as illustrating an impermissible interference by one branch with another, my copy of page 433 discusses the actual provisions of the act in question.

The other Nixon case, *US v Nixon*, 418 US 683 (1974) involved the subpoena of documents and tapes by the Watergate Special Prosecutor in connection with a criminal investigation. Again, Nixon had argued against it on the basis on separation of powers. The Court squarely rejected that argument.

As a matter of fact, in *Nixon v Adm'r of General Services*, *supra*, the Supreme Court quoted with approval a less than complete division of powers, citing the concurring opinion of Justice Jackson in *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579 (1952).

In designing the structure of our Government and dividing and allocation the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.”

Youngstown Sheet & Tube Co v Sawyer, 343 US 579, 635 (1952)

The Defendants have cited *INS v Chadha*, 462 US 919 (1983) in support of the proposition that a sitting circuit judge, who attempted to enlarge the scope of a co-equal prosecutor's power to investigate and charge citizens with a crime, crossed the line.

The *Chadha* case involved an East Indian who was born in Kenya, held a British passport, and who entered the United States on a non-immigrant student visa which expired. He came to the attention of the Immigration and Naturalization Service, and deportation proceedings were commenced. At a deportation hearing, Chadha conceded that he was deportable but filed an application for suspension of his deportation under 8 USC 1254(a)(1), Section 244(a)(1).

This section allowed the Attorney General to admit aliens for permanent residence, providing that they met certain conditions and if deportation would result in extreme hardship. The Attorney General agreed with Chadha and suspended the deportation.

When the Attorney General does this, he then forwards to Congress a list of the people who have been so treated. This was required under 8 USC 1254(c)(1). Section 244(c)(1).

Congress allowed itself to veto the Attorney General's decision by exercising power under 8 USC 1254(c)(2) of the act. To do so only required that a resolution be passed by the House of Representatives or the Senate. It did not require that a bill be passed by both houses and signed by the President.

This was the main issue in the case. The Supreme Court held that Section 244(c)(2) was unconstitutional because it by-passed the Constitutional requirements for passing legislation and allowed one house of Congress to overrule the action of the executive branch without passing legislation.

In the copy of the case available to me, the citation or language appearing on page 9 of the Defendants Brief does not appear. Those pages discuss the Constitutional provisions dealing with the passing of laws in bicameral fashion and discuss Justice White's dissent in which he undertook to make a case for the proposition that a one-house veto was a useful "political invention."

Another United States Supreme Court case cited by Defendants, *Springer v Philippine Islands*, 277 US 189 (1928) involved whether the Philippine legislature could appoint directors to corporations organized under the legislative authority of the Philippine Islands. The National Coal Company and the Philippine National Bank were involved. These two companies, and several others, were, in essence, the property of the Philippine government.

The Philippine Islands are governed by congressional legislation known as the Organic Act passed in 1916 which vested the executive power in the "Governor General of the Philippine Islands." The Philippine legislature had been passing acts to turn the authority to run these substantially government-owned corporations by boards which were appointed by the legislature. The Governor General objected on the basis that the legislature was attempting to usurp power which belonged to the executive branch under the Organic Act. The Supreme Court agreed and found that the legislature had exceeded its powers.

None of these cases stand for the proposition that the separation of powers doctrine was violated, or that the Michigan Constitution prohibits MCL 49.160

The next question is whether there is something in the Michigan Constitution which requires rejection of MCL 49.160.

Defendants have cited the four relevant sections of the Michigan Constitution. However, one must note that Article VI, Sec. 14 specifically allows circuit judges to fill vacancies of both the clerk and prosecuting attorney positions.

The clerk of each county organized for judicial purposes or other officer performing duties of such office as provided in a county charter shall be clerk of the circuit court for such county. The judges of the circuit court may fill a vacancy in an elective office of county clerk or prosecuting attorney within their respective jurisdictions.

As both MCL 776.18 and MCL 49.160 recognize, there are times when a vacancy, in fact, occurs even though the county prosecutor still exists. MCL 776.18 allows the circuit judge to appoint an assistant prosecutor when no conflict exists and MCL 49.160 allows the circuit judge to appoint a special prosecutor when a conflict does exist.

While none of the cases cited by either the Defendants or the Attorney General state that it is unconstitutional for a judge to appoint a prosecutor, and the Michigan Constitution specifically allows it, both argue that it is unconstitutional for Judge J. Richard Ernst to appoint this special prosecutor.

The Defendants seem to argue that the only way this prosecutor should have been appointed was for the Order appointing her to specify the defendants and the charges to be brought. This, of course, would place the circuit judge in the position of exercising prosecutorial discretion, a position which is recognized, in all of the Michigan cases cited, as impermissible.

The Attorney General seems to believe that it would have been permissible for Judge Ernst to appoint a prosecutor from some other county to act, a stranger to Iosco County, who would also have had to be appointed under MCL 49.160. The upshot of this argument is that the

statute is fine, the choice of special prosecutor is not. The problem is that the statute specifically allowed the court to appoint "an attorney at law as special prosecutor."

The Attorney General argues that this Court should reconsider its decision to grant leave to appeal in this case because of an expected change in the law. (The new law should probably be called "Maureen's Law" after the style of the day.)

However, the Attorney General is incorrect in assuming that this Court's ruling will have no precedential impact, particularly in view of the Defendants' contention that the statute MCL 49.160 is unconstitutional.

There are several general rules dealing with determining the constitutionality of legislation.

The party challenging the facial constitutionality of an act "must establish that no set of circumstances exists under which the [a]ct would be valid. The fact that the . . . [a]ct might operate unconstitutionally under some conceivable set of circumstances is insufficient . . ." *United States v Salerno*, 481 US 739, 745; 107 S Ct 2095; 95 L Ed 2d 697 (1987). Further, "if any state of facts reasonably can be conceived that would sustain [an act], the existence of the state of facts at the time the law [or, here, an executive order] was enacted must be assumed." 16 Am Jur 2d, Constitutional Law, § 218, p 642. In addition, "[a] statute [or, here, an executive order] may be constitutional although it lacks provisions which meet constitutional requirements, if it has terms not excluding such requirements, and in this situation the court is justified in holding that the statute was intended to be subject to such requirements, and that those requirements are to be considered as embodied in the statute." *Id.*, § 225, p 659.

(Quoted with approval in *Council of Organizations v Governor*, 455 Mich 557, 568-569; 566 NW2d 208 (1997)

Straus v Governor, 459 Mich 526, 543 (1999)

Here, the Defendants and Attorney General make it clear that the statute is constitutional. The Attorney General argues that the statute would be fine if a different person were appointed and reinvestigated and decided whether or not charges are warranted. The Defendants argue that a special prosecutor should never be allowed to bring charges. These arguments defeat each other and show that there is a circumstance when the statute would be valid.

However, let us assume that the statute was not valid. What would occur? We can look to *Sturak v Ozomaro*, 238 Mich App 549, 560 (1999):

We begin our analysis by restating the well-settled general rule that unconstitutional statutes are void ab initio. In *Stanton v Lloyd Hammond Produce Farms*, 400 Mich 135; 253 NW2d 114 (1977), our Supreme Court explained this proposition as follows:

"The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and ineffective for any purpose; since unconstitutionality dates from the time of its enactment, and not merely from the date of the decision so branding it, an unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed." [Id. at 144-145, quoting 16 Am Jur 2d, Constitutional Law, § 177, pp 402-403.]

The unconstitutional statute "leaves the question that it purports to settle just as it would be had the statute not been enacted." 16A Am Jur 2d, Constitutional Law, § 203, p 90.

Another general rule is that judicial decisions are to be given full retroactive effect. *Michigan Educational Employees Mut Ins Co v Morris*, 460 Mich 180, 189; ___ NW2d ___ (1999); *Lindsey v Harper Hosp*, 455 Mich 56, 68; 564 NW2d 861 (1997).[7] As the Court in *Stanton*, supra at 147, also recognized, however, judicial decisions finding statutes unconstitutional will not be applied retroactively without concern for justice and equitable treatment. Where injustice might result from full retroactivity, courts have adopted a more flexible approach, giving holdings limited retroactive or prospective effect. *Lindsey*, supra. In deciding to what extent to apply retroactively a changed legal interpretation of a statute, we must consider the following elements: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice. *Morris*, supra at 190; *Lincoln v General Motors Corp*, 231 Mich App 262, 268; 586 NW2d 241 (1998); *Jahner v Dep't of Corrections*, 197 Mich App 111, 114; 495 NW2d 168 (1992).[8] We may also incorporate into our analysis any other facts or considerations relevant to the instant dispute that may affect the fairness of our determination. *Stanton*, supra at 147. See also *Morris*, supra at 190 ("resolution of the retrospective-prospective issue ultimately turns on considerations of fairness and public policy") (citation omitted); *Sellers v Hauch*, 183 Mich App 1, 11-12; 454 NW2d 150 (1990) (The overriding goals in determining whether to apply retroactively a new rule of law are to effectuate fairness and public policy.). No specific factor will control, nor will any particular result necessarily prevail from decision to decision.

"It is evident that there is no single rule of thumb which can be used to accomplish the maximum of justice in each varying set of circumstances. The involvement of vested property rights, the magnitude of the impact of decision on public bodies taken without warning or a showing of substantial reliance on the old rule may influence the result."

The benefit of flexibility in opinion application is evident. If a court were absolutely bound by the traditional rule of retroactive application, it would be severely hampered in its ability to make needed changes in the law because of the chaos that could result in regard to prior enforcement under that law. . . . Without the flexibility to so apply the decision, it would be unlikely that much needed change could be effectuated in this state. [*Placek v Sterling Heights*, 405 Mich 638, 665; 275 NW2d 511 (1979).]

Applying this logic to the case at hand, we see that if this court finds MCL 49.160 unconstitutional, anyone who was ever appointed under that statute was acting unconstitutionally. Therefore, anyone convicted by any special prosecutor would have been convicted illegally. This follows because an unconstitutional statute is void *ab initio*.

The general rule is that judicial decisions are to be given full retroactive effect. Therefore, if this statute is unconstitutional, it always was, and anyone convicted at any time in the past certainly can complain about it.

The argument might be made that such a ruling should be applied only prospectively, thereby limiting the damage. However, that procedure should not be followed here. Under the teachings of *MEEMIC v Morris*, 460 Mich 180, 195 (1999) prospective application should not be used. The case involved an erroneous ruling of the Court of Appeals which precluded the setoff of social security benefits from no-fault automobile insurance benefits. MEEMIC, which had paid the benefits after the Court of Appeals ruling which it could not collect in total if the ruling were given retroactive effect, because of the defense of laches.

The Michigan Supreme Court held that there was no reason to find the decision to be prospective only.

Only if this Court's decision can be said to be "unexpected" or "indefensible" in light of the law in place at the time of the acts in question would there be a question about whether to afford the decision complete retroactivity. *People v Sexton*, 458 Mich 43, 64; 580 NW2d 204 (1998). It can hardly be considered "unexpected" or "indefensible" that this Court would reverse a Court of Appeals decision that was contrary to the clear and unambiguous language of the statute, the legislative intent behind the statute, and two prior opinions of this Court.

Defendants argue and we recognize that a published decision of the Court of Appeals is controlling precedent for trial courts. MCR 7.215(C)(2).^{*} Defendants argue that because the Court of Appeals holding in *Profit* was precedent for the trial courts, it was the then-existing law at the time the disputed no-fault personal protection insurance benefits were paid. However, this argument fails to recognize the hierarchal nature of the court system, as well as the clear and unambiguous language of the statute. In *Doyle*, this Court stated:

Additionally, the Court stated that its *Tucker* decision was “the law” on the date of defendant’s offense and that retroactive application of *Bewersdorf* “would [therefore] undermine the rule of law in this state.”

This approach taken by the Court of Appeals overlooks the hierarchal nature of the court system, as well as the special rule of the Legislature when it provides a clear statutory enactment. In the view of the Court of Appeals majority, the “rule of law” in this state is more offended by the retroactive application of a controlling decision by this Court, than it is by a continued application of an erroneous and overruled decision by the Court of Appeals. [*Id.* at 108-109 (citations omitted).]

* MCR 7.215(C)(2) [provides:

A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis. The filing of an application for leave to appeal to the Supreme Court or a Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals.

Since both the Defendants and the Attorney General argue that the statute has always precluded the investigation and bringing of charges by a special prosecutor such as the prosecutor in this case, and argue that the Court of Appeals opinions support that position, a ruling which adopts that point of view could hardly be said to be “unexpected” or indefensible” – full retroactivity would be warranted. This leads to the problem with prior convictions.

However, if the Court, on the other hand agrees with Appellant, the statute is clear unambiguous and constitutional, no problems occur. The decisions in both *In re Special Prosecutor, supra* and *People v Herrick, supra*, don’t need to be overruled. They were correctly decided on their facts. The *dicta* is unnecessary to the decision. The Court of Appeals was in

error in this case by adopting the *dicta* and this case can be returned to the trial court. No other cases will be affected.

The Attorney General claims that the circuit judge should have acted under different statutes rather than using the simple procedure of appointing a special prosecutor. If the Attorney General had accepted the Freund case when Mr. Rapp sent it to him, this case might not be here. If the Attorney General's office had investigated and accepted Mr. Freund's police complaint in which he wanted to bring perjury charges, no special prosecutor would have been appointed. "If wishes were horses, beggars would ride. . . ."

A lot of different choices might have been made. None were required. The circuit judge had every right to choose "an attorney." Whether or not that choice was flawed, or whether or not the attorney chosen had criminal law experience are not the questions before the court. (Although, if the Court is interested in the experience of the special prosecutor, see Appellant's Appendix, pages 26a-28a.)

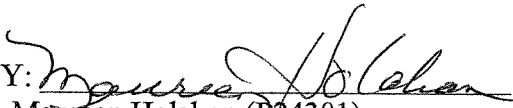
The Defendants also shoot off an *ad hominem* blast at the special prosecutor. They seem offended that a special prosecutor, acting on behalf of the People of the State of Michigan has an interest in requiring state employees to act lawfully. They should not be able to charge someone with a criminal activity when they know he did not do the act. Rather than "chilling wetlands enforcement proceedings within Iosco County," as the Defendants maintain, allowing this case to proceed simply stands for the proposition that even state employees must abide by the law.

This case involves the "interpretation" of a statute which needs no interpretation. It is constitutional, has been used for years, and was properly employed in this case.

RELIEF REQUESTED

WHEREFORE, Plaintiff-Appellant, State of Michigan, by and through the Special Prosecutor prays this Honorable Court reverse the decision of the Court of Appeals in the consolidated cases of People of the State of Michigan v Fred Gottschalk, No. 237681, and People of the State of Michigan v Jeffrey Silagy, No 237682, dated June 18, 2002, affirm the decision of the Circuit Court and remand this case to the Circuit Court for trial on the charges filed.

Respectfully submitted,

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Dated: January 7, 2003

**STATE OF MICHIGAN
IN THE SUPREME COURT**

**Appeal from the Court of Appeals
Donald S. Owens, Presiding Judge**

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant,

Supreme Court Nos.
121833 & 121834

-vs-

FREDERICK GOTTSCHALK and
JEFFREY SILAGY

Defendants-Appellees.

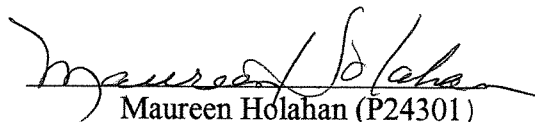
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PROOF OF SERVICE

Maureen Holahan certifies that on January 7, 2003, she provided 2 copies of Plaintiff-Appellant's Reply Brief on Appeal to Michael G. Woodworth at the address indicated above and 1 copy of each to Robert Ianni by United States Postal Service, postage prepaid.


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